

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

DANIEL J. O'HARE, et al,
Plaintiffs,

v.

VULCAN CAPITAL, L.L.C., et al,
Defendants,

 \mathbf{v}_i

**TDF & COAL, INC. and VULCAN
POWER GROUP, L.L.C.**
Nominal Parties

**VULCAN ADVANCED MOBILE
POWER SYSTEMS, L.L.C., et al,**
Plaintiffs/Counter Defendants

V.

DANIEL J. O'HARE, et al,
*Defendants/Counter-Plaintiffs/
Third Party Plaintiffs*

V.

VULCAN CAPITAL, L.L.C., et al
Third Party Defendants

CASE NO. SA 04-CA-0566

CASE NO. SA-07-CA-0297
Consolidated with
CASE No. SA-04-CA-0566

MOTION TO WITHDRAW

Rick L. Lambert and William Lewis Sessions and the law firm of Conner & Winters, LLP (“Counsel”) respectfully request leave of Court to withdraw as counsel for Defendants, Vulcan Capital, L.L.C.; Vulcan Power Group, L.L.C.; Vulcan Advanced Mobile Power Systems, L.L.C.; Vulcan AMPS, L.L.C.; Vulcan AMPS II, L.L.C.; Vulcan AMPS III, L.L.C.; Vulcan AMPS IV, L.L.C.; Vulcan AMPS V, L.L.C.; Vulcan AMPS VI, L.L.C.; Vulcan Energy Solutions, L.L.C.; North Carolina Power Holdings, L.L.C.; Lumberton Power, L.L.C.;

Elizabethtown Power, L.L.C.; Vulcan Power Services, L.L.C. and Vulcan Power Leasing, L.L.C.; TDF & Coal, Inc.; ENgeneration Operating Services, L.L.C.; Texas Mpower Systems, L.L.C. (collectively referred to herein as the “Clients”), and in support thereof would show:

1. The Declaration of Rick L. Lambert supports this Motion and it is contained in the Appendix which is incorporated herein by reference.

2. Rick L. Lambert, William Lewis Sessions, and the law firm of Sessions Lambert Selwyn, LLP (“SLS”) filed a Motion to Withdraw on February 4, 2009. (Doc. No. 193). (App. at 2).

3. Kevin C. Davis, purportedly on behalf of all the Clients, wrote to the Court and objected to the Motion stating: “The Vulcan Entities and SLS have been negotiating the timing of the payment of the outstanding billings. A billing dispute, regarding timing does not constitute and irreconcilable conflict.” *Id.*

4. Notwithstanding the assertion by Mr. Davis, there is no dispute with the Clients regarding the amount of fees due to SLS, nor the timing of payment. *Id.* On or about July 11, 2007, the Clients executed a promissory note, payable to SLS in the amount of \$534,816.00. *Id.* Ford Graham, Kevin Davis and Gerald Campbell, Jr. each guaranteed payment of the amount due to SLS. *Id.*

5. The Clients were unable to pay the promissory note when demanded so SLS and the Clients agreed to a forbearance agreement. *Id.* The Clients repeatedly promised to make payment pursuant to the forbearance agreement culminating with the promise to pay in full before December 31, 2008. *Id.* SLS continually told Clients that they must pay in full by December 31, 2008 or SLS would withdraw. *Id.*

6. Despite recurring promises, Clients did not pay the amount due by December 31, 2008. Clients have not paid any amount at all since October 2007. *Id.* Clients currently owe

SLS more than \$445,000.00. *Id.* Kevin Davis stated in his letter to this Court that the “Vulcan Entities and SLS have been negotiating the timing of payment.” *Id.* At the time Mr. Davis made the statement, there had been no offer of payment by Clients. *Id.*

7. The Court, having considered the Motion and the objection, denied the Motion without prejudice. After the Court denied that Motion, Movants attempted to resolve the payment issue with Clients. *Id.* Clients repeatedly promised payment, but as of the date of this Motion, Clients have not paid the full amount due SLS nor and Conner & Winters, LLP. *Id.* Because of Clients’ failure to pay fees and expenses due, Movants file this Motion.

8. After the Court denied SLS’ Motion to Withdraw, Movants tried several times to have a conversation with Clients to resolve the dispute between Movants and Clients. *Id.* Rick L. Lambert, William L. Sessions were finally able to have a telephone conference with Ford Graham and Kevin Davis early in the week of April 20, 2009. *Id.* During the telephone conference Ford Graham and Kevin Davis acknowledged that Clients intended to pay the full amount due SLS. *Id.* Ford Graham and Kevin Davis also promised to make a written offer by April 24, 2009 regarding the clients’ payment of fees due SLS and adequate assurance that fees and expenses incurred for this case would be timely paid. *Id.* Despite the promise, no offer was made by Clients. *Id.*

9. In mid May 2009, the Clients presented to Movants two checks for \$20,000.00 (one payable to SLS and the other payable to Conner & Winters, LLP) and promised that they would start making regular payments. *Id.* The Clients asked that Movants hold the checks for a few days until there were sufficient funds in the account to cover the checks. *Id.* Counsel has held the checks because the Clients state that there are not funds in the account to cover the checks. *Id.* Since the end of July 2009, Client representatives have repeatedly promised that

payment would be made in a matter of days. *Id. at 2-3.* Nonetheless, Clients have only paid \$25,000.00 as of the time this Motion is filed. *Id. at 3.*

10. Clients have also failed to provide adequate assurance that Clients will be able to pay the fees and expenses incurred going forward through trial. *Id.* Because Clients have demonstrated their inability to perform their obligations related to the representation and cannot provide assurances that they will be able to pay fees incurred for this lawsuit going forward, Counsel have the right to withdraw pursuant to Rule 1.15(b)(5) of the TEX. DISCIPLINARY R. PROF'L CONDUCT. *Id.* Requiring Counsel to continue to represent Clients would be an unreasonable financial hardship upon Counsel. *Id.*

11. Clients breached their agreement with Movants by failing to pay fees and expenses when due. *Id.* Movants repeatedly warned Clients that Movants would withdraw unless Clients' cured the breach, but Clients failed to cure. *Id.* Rule 1.15(b)(5) of the TEX. DISCIPLINARY R. PROF'L CONDUCT states that except as required by paragraph (a), a lawyer shall not withdraw from representing a client unless the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services, including an obligation to pay the lawyer's fee as agreed, and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled. Comment 8 to Rule 1.15 states that withdrawal is permitted by paragraph (b)(5) even though the withdrawal may have a material adverse effect upon the interest of the client.

12. The Clients may be contacted via their representatives at their addresses and telephone numbers as follows:

Ford F. Graham and Kevin C. Davis
150 East 52nd Street, 11th Floor
New York, NY 10022
(212) 980-9520

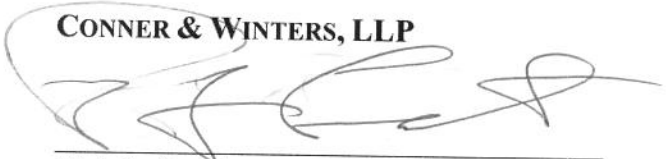
Mr. Gerald Campbell, Jr.
1578 Summerland Way
Brentwood, CA 94513
(910) 827-1867

13. Plaintiffs' do not oppose Counsels' withdrawal and Counsels' withdrawal will not disrupt the trial in light of the Court's ruling on Plaintiffs' motions for summary judgment. *Id.* There is no prejudice to Clients by granting the motion to withdraw given that the Court has already granted partial summary judgment as to all of Clients claims and defenses asserted in this case. *Id.* The only remaining issues related to the Clients are the amount due pursuant to the settlement agreement and any award of attorneys fees to Plaintiffs. *Id.* To force Movants to continue to represent Clients (particularly under these circumstances) is a violation of the 13th Amendment of the U.S. Constitution which prohibits involuntary servitude.

WHEREFORE, Rick L. Lambert and William L. Sessions pray that they be allowed to withdraw as attorneys of record for Vulcan Capital, L.L.C.; Vulcan Power Group, L.L.C.; Vulcan Advanced Mobile Power Systems, L.L.C.; Vulcan AMPS, L.L.C.; Vulcan AMPS II, L.L.C.; Vulcan AMPS III, L.L.C.; Vulcan AMPS IV, L.L.C.; Vulcan AMPS V, L.L.C.; Vulcan AMPS VI, L.L.C.; Vulcan Energy Solutions, L.L.C.; North Carolina Power Holdings, L.L.C.; Lumberton Power, L.L.C.; Elizabethtown Power, L.L.C.; Vulcan Power Services, L.L.C.; Vulcan Power Leasing, L.L.C.; TDF & Coal, Inc.; ENgeneration Operating Services, L.L.C. and Texas Mpower Systems, L.L.C., and for such other and further relief to which they may be entitled.

Respectfully submitted,

CONNER & WINTERS, LLP


Rick L. Lambert

Texas Bar No. 11844725

rlambert@cwlaw.com

William Lewis Sessions

Texas Bar No. 18041500

lsessions@cwlaw.com

1700 Pacific Avenue, Suite 2250

Dallas, TX 75201

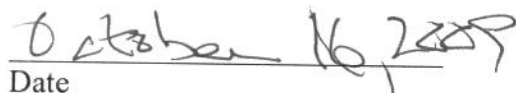
Lambert Direct Phone: (214) 217-8866

Lambert Direct Fax: (214) 217-8867

**ATTORNEYS FOR DEFENDANTS,
VULCAN CAPITAL, L.L.C.; VULCAN
POWER GROUP, L.L.C.; VULCAN
ADVANCED MOBILE POWER
SYSTEMS, L.L.C.; VULCAN AMPS,
L.L.C.; VULCAN AMPS II, L.L.C.;
VULCAN AMPS III, L.L.C.; VULCAN
AMPS IV, L.L.C.; VULCAN AMPS V,
L.L.C.; VULCAN AMPS VI, L.L.C.;
VULCAN ENERGY SOLUTIONS,
L.L.C.; NORTH CAROLINA POWER
HOLDINGS, L.L.C.; LUMBERTON
POWER, L.L.C.; ELIZABETHTOWN
POWER, L.L.C.; VULCAN POWER
SERVICES, L.L.C.; VULCAN POWER
LEASING, L.L.C.; TDF & COAL, INC.;
ENGAGEMENT OPERATING
SERVICES, L.L.C.; TEXAS MPOWER
SYSTEMS, L.L.C.**

Certificate of Conference

I hereby certify that I discussed the merits of this Motion with Counsel for Plaintiffs. Plaintiffs are not opposed.


Date


Rick L. Lambert

Certificate of Service

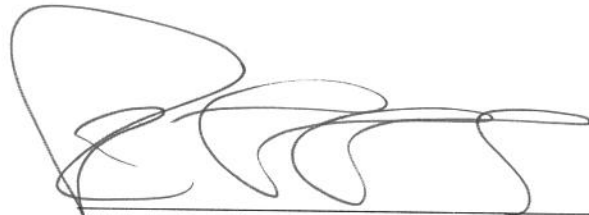
I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Mr. John S. Black and Mr. Jean C. Frizzell
REYNOLDS, FRIZZELL, BLACK,
DOYLE, ALLEN & OLDHAM, L.L.P.
1100 Louisiana, Suite 3500
Houston, TX 77002

Mr. Rudy A. Garza
GARZA & LAZOR, P.C.
300 Convent Street, Suite 2400
San Antonio, TX 78204

Mr. Jesse R. Castillo
CASTILLO SNYDER, P.C.
300 Convent Street, Suite 1020
San Antonio, TX 78205-3789

October 16, 2009
Date
24751


Rick L. Lambert

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Party
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VULCAN CAPITAL, L.L.C., et al
Third Party Defendants

DECLARATION OF RICK L. LAMBERT

I, Rick L. Lambert, under penalty of perjury pursuant to 28 U.S.C. § 1746 declare that the following facts are true and correct and within my personal knowledge:

1. My name is Rick L. Lambert. I am an attorney of record for the Defendants Vulcan Capital, L.L.C., Vulcan Power Group, L.L.C.; Vulcan Advanced Mobile Power Systems, L.L.C.; Vulcan AMPS, L.L.C.; Vulcan AMPS II, L.L.C.; Vulcan AMPS III, L.L.C.; Vulcan AMPS IV, L.L.C.; Vulcan AMPS V, L.L.C.; Vulcan AMPS VI, L.L.C.; Vulcan Energy Solutions, L.L.C.; North Carolina Power Holdings, L.L.C.; Lumberton Power, L.L.C.; Elizabethtown Power, L.L.C.; Vulcan Power Services, L.L.C.; Vulcan Power Leasing, L.L.C. (collectively referred to herein as "The Vulcan Entities"); TDF & Coal, Inc.; ENgeneration

Operating Services, L.L.C.; Texas MPower Systems, L.L.C. (together with the Vulcan Entities collectively referred to herein as the "Clients"). As counsel for the Defendants, I have personal knowledge of the factual statements made in this declaration.

2. I, William Lewis Sessions, and the law firm of Sessions Lambert Selwyn, LLP ("SLS") filed a Motion to Withdraw on February 4, 2009. (Doc. No. 193).

3. Kevin C. Davis, purportedly on behalf of all the Clients, wrote to the Court and objected to the Motion stating: "The Vulcan Entities and SLS have been negotiating the timing of the payment of the outstanding billings. A billing dispute, regarding timing does not constitute an irreconcilable conflict."

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6. Despite recurring promises, Clients did not pay the amount due by December 31, 2008. Clients currently owe SLS more than \$445,000.00. Kevin Davis stated in his letter to this Court that the "Vulcan Entities and SLS have been negotiating the timing of payment." At the time Mr. Davis made the statement, there had been no offer of payment by Clients.

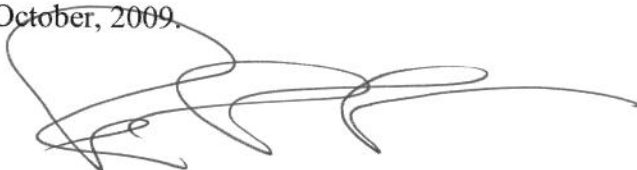
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8. In mid May 2009, the Clients presented to Movants two checks for \$20,000.00 (one payable to SLS and the other payable to Conner & Winters, LLP) and promised that they would start making regular payments. The Clients asked that Movants hold the checks for a few days until there were sufficient funds in the account to cover the checks. Counsel has held the checks because the Clients state that there are not funds in the account to cover the checks. Since the end of July 2009, Client representatives have repeatedly promised that payment would be made in a matter of days. Nonetheless, the Clients have only paid \$25,000.00 as of the date of this declaration.

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10. Clients breached their agreement with Counsel by failing to pay fees and expenses when due. Counsel have given Clients many opportunities to cure the default and informed the Clients that we would withdraw if they failed to cure. Rule 1.15 of the TEX. DISCIPLINARY R. PROF'L CONDUCT gives Movants the right to withdraw even where withdrawal has a material adverse affect on the interest of the Clients. Nonetheless, there is no prejudice to Clients by granting the motion to withdraw given that the Court has already granted partial summary judgment as to all of Clients claims and defenses asserted in this case. The only remaining issues related to the Clients are the amount due pursuant to the settlement agreement and any award of attorneys fees to Plaintiffs. Plaintiffs do not oppose the Motion. To force Movants to continue to represent Clients (particularly under these circumstances) is a violation of the 13th Amendment of the U.S. Constitution which prohibits involuntary servitude.

Executed this 17th day of October, 2009.



Rick L. Lambert

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